

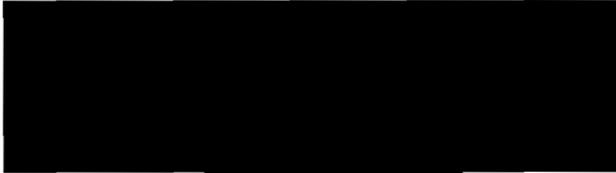
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U.S. Citizenship
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Services

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FILE: [REDACTED] Office: NEBRASKA SERVICE CENTER Date: **MAY 29 2008**
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IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to
Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to
the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification as an “alien of extraordinary ability” in the arts, pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A). The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

On appeal, the petitioner submits a personal statement and new evidence. In his statement, the petitioner raises certain humanitarian concerns relating to a separate immigration proceeding. Such concerns, however, are not relevant to a determination of the petitioner’s eligibility for the classification sought in this matter. For the reasons discussed below, while we withdraw the director’s finding that the petitioner has not played a critical role in a distinguished production, we uphold the director’s overall conclusion that the petitioner has not established his eligibility for the classification sought.

Section 203(b) of the Act states, in pertinent part, that:

(1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien’s entry into the United States will substantially benefit prospectively the United States.

Citizenship and Immigration Services (CIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* 56 Fed. Reg. 60897, 60898-9 (Nov. 29, 1991). As used in this section, the term “extraordinary ability” means a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the regulation at 8 C.F.R. § 204.5(h)(3). The relevant criteria will be addressed below. It

should be reiterated, however, that the petitioner must show that he has sustained national or international acclaim at the very top level.

This petition seeks to classify the petitioner as an alien with extraordinary ability as an actor and singer. In his decision, the director cited *Matter of Price*, 20 I&N Dec. 953, 955 (Assoc. Comm. 1994), for the proposition that while participation in the major leagues may be relevant in considering an athlete's eligibility, a blanket rule for all major league athletes would contravene congressional intent. This reasoning is also reflected in the supplementary information at 56 Fed. Reg. 60899 (Nov. 29, 1991). The director concluded that the reasoning could be applied to "individuals employed in prominent capacities in other fields of endeavor."

On appeal, the petitioner asserts that performing artists, who can have lengthy careers, cannot be compared with athletes, who typically have short careers. While we acknowledge that the field of athletics is, in many ways, not a useful analogy for the performing arts, it can be reasonably extrapolated from the supplementary information about athletics cited above that participation at the top professional level of another competitive field, performing arts, is also insufficient. Thus, while it is a favorable factor that the petitioner has performed both on and off Broadway and with national touring companies of a major show, these performances alone are insufficient. A Broadway performer must still meet the regulatory requirements discussed below.

The regulation at 8 C.F.R. § 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, international recognized award). Barring the alien's receipt of such an award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability. On appeal, the petitioner notes that not every acclaimed actor has won an award or prize. We concur that the petitioner need not meet any one criterion provided that he meets three criteria. The petitioner has submitted evidence that, he claims, meets the following criteria.¹

Published materials about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

The petitioner submitted several newspaper reviews of shows in which he has appeared. In these reviews, however, the petitioner is mentioned only briefly in a single sentence. The director concluded that these reviews were not primarily "about" the petitioner. On appeal, the petitioner no longer claims to meet this criterion. We concur with the director that the reviews that mention the petitioner only in passing cannot be considered to be "about" him.

¹ The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.

Initially, the petitioner asserted that his role as Ubaldo Piangi in "The Phantom of the Opera" serves to meet this criterion. He noted that he has performed in more than 2,000 performances of the production worldwide. He asserted that the "repeated emphasis of this performance record in critical reviews and the attached testimonial letters clearly establishes that I have gained international recognition for my work." In addition, the petitioner asserted that his "skills as a tenor, character versatility and performance stamina have given the musical and stage acting industry an artist with extraordinary combination of strengths." The petitioner then discussed the reference letters supporting the petition.

The director's request for additional evidence included the following:

Please document how your contributions to the field have been original and submit objective evidence of the importance of such contributions to the field. Evidence that those outside the alien's circle of colleagues and acquaintances consider the work especially valuable. Explain how your performances have had a significant impact on the field as a whole and submit evidence to support your claim.

In response, counsel asserted that the petitioner's original contributions "are recognized by two of the **most revered names in musical theatre:** [REDACTED] and [REDACTED]. Counsel cited two non-precedent decisions from this office for the proposition that the "prestige of a testimonial from a luminary such as [REDACTED] or [REDACTED] must be given due consideration when assessing **the significance of the testimonial.**" Counsel concluded that the evidence "clearly establishes a substantial demand for [the petitioner's] services in the field of musical theatre, and directors, producers and actors alike acknowledge [the petitioner's] contributions to musical theatre."

While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Moreover, in one of the non-precedent decisions on which counsel relies, the alien had authored several original articles and books. In the second case, the petitioner was a sound designer of original sound tracks.

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.* 817 F. 2d 74, 75 (9th Cir. 1987)(administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001)(unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

According to the regulation at 8 C.F.R. § 204.5(h)(3)(v), an alien's contributions must be both original and of major significance. We must presume that both the word "original" and the phrase "major

significance” are not superfluous and, thus, that they have some meaning. To be considered an original contribution of major significance in the field of performing arts, the contribution must be novel and influential. We concur with the director that talent alone cannot serve to meet this criterion.

We do not contest the prestige of the individuals who have written letters in support of the petition. The opinions of experts in the field, however, while not without weight, cannot form the cornerstone of a successful claim of sustained national or international acclaim. CIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien’s eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien’s eligibility. *See id.* at 795.

In evaluating the reference letters, we note that letters containing mere assertions of widespread acclaim and talent are less persuasive than letters that specifically identify contributions and provide specific examples of how those contributions have influenced the field.

confirms that the petitioner’s assigned role in the U.S. touring company of “The Phantom of the Opera,” Buquet, required a “complete physical transformation into a menacing old man” and that the role that the petitioner previously performed in Canada and understudied in the United States, Ubaldo Piangi, is “an extremely difficult part as it requires the actor to hit a high ‘C’ several times.” does not assert that the petitioner’s ability to hit the high “C” several times is a novel talent that is unique even among renowned opera singers.

n, who played the Phantom in the Canadian production of “The Phantom of the Opera,” reiterates that Ubaldo Piangi is a difficult role and asserts that while he has seen other productions of the show and has been “intimately familiar with it from its very creation,” the petitioner is the best artist to fill this role.

director of the original Canadian cast of “The Phantom of the Opera,” reiterates that the petitioner performed the “highly demanding” role of Ubaldo Piangi in that cast and concludes that his “top tenor voice is among the best in the musical theater, and he continues to prove it by his frequent engagements with prominent theater companies here and around the world.”

We are not persuaded that performing in a role that was created by Andrew Lloyd Weber and was performed by others actors previously, who also presumably hit the high “C” several times, is an original contribution.

, formerly an associate producer at the Paper Mill Playhouse in New Jersey, explains that the petitioner is the only actor to whom the theater offered a resident artist contract but that the petitioner had to turn down the contract to accept a role in the Broadway revival of Stephen Sondheim’s “Follies.” P, an artistic associate at the Paper Mill Playhouse, asserts that the petitioner is

the best singer in his age range, “eminently employable” and a “valuable quantity that is necessary and needed.”

█, who performed with the petitioner in the Broadway revival of Stephen Sondheim’s *Follies*, asserts that the very fact that the petitioner is always working in the field “would put him in a class beyond most performers.” The petitioner, however, must compare with the top small percentage of those who are able to work in the field; we will not broaden the petitioner’s field to include those who only aspire to make their living exclusively by working in the field simply because it is a competitive field.

█, a director of children’s animated programming in New York City, asserts that the petitioner excelled in the technical aspects of dubbing voices, is a great actor and a master of dialects and voices.

█, the Artistic Director for the Irish Repertory Theatre, asserts that the *Wall Street Journal* has characterized the theater as “one of the finest” in America and that the petitioner “has made an invaluable contribution to the success of our company.” █ does not cite any statistics suggesting that the theater’s success increased while the petitioner was performing in prominent roles there.

As stated above, the petitioner performed in the Broadway revival of Sondheim’s “Follies” as well as other Sondheim musicals. █ authored a letter supporting the petition, asserting that the petitioner “is an excellent tenor and a serious artist and any production would be fortunate to have him in its cast.”

The record demonstrates that the petitioner is respected by major names in his field. While these letters are important evidence, they reflect more on the nature of the petitioner’s various roles than the originality or influential nature of his career. Thus, these letters cannot demonstrate that the petitioner meets this criterion.

Evidence of the display of the alien’s work in the field at artistic exhibitions or showcases.

The petitioner claims to meet this criterion through his performances. This criterion, however, relates to the visual arts. The petitioner is a performing artist. It is inherent to the field of performing arts to perform on stage. Not every stage performance is an artistic exhibition or showcase. We find that the petitioner’s performances are best considered under the leading or critical role criterion set forth at 8 C.F.R. § 204.5(h)(3)(viii) and discussed below.

Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

From 1989 through 1992, the petitioner performed the role of Ubaldo Piangi in the original Canadian production of Andrew Lloyd Weber's "The Phantom of the Opera" and sings this role on the cast recording from 1990. In 1996, the petitioner played the same part in West End London. According to his contract, from 2003 through 2005 he was a "Singer/Dancer" in the U.S. national touring company's version of the same show, also serving as understudy for Ubaldo Piangi. The various programs for the tour list the petitioner as playing Joseph Buquet and serving as understudy for Ubaldo Piangi. Peter von Mayrhauser, Production Supervisor for "The Phantom of the Opera" USA confirms that the petitioner played the role of Ubaldo Piangi on the tour "on many occasions." In 2001, the petitioner played Sam Deems in the original Broadway cast for the revival of Stephen Sondheim's "Follies," nominated for a 2001 Tony Award in the Best Revival of a Musical category. The petitioner also played one of the Liebeslieder singers in Mr. Sondheim's "A Little Night Music" at the Kennedy Center for the Performing Arts in 2002. Finally, the petitioner was featured in "The Irish . . . And How They Got That Way" at the Off-Broadway Irish Repertory Theatre, although the contract for the national tour indicates he was only an understudy.

The director concluded that Ubaldo Piangi is not "one of the two lead male roles" and, more generally, that the petitioner had not demonstrated that his roles were leading or critical for the specific production. On appeal, the petitioner notes that he was "prominently featured on the Marquee Poster and billed as such."

Significantly, the regulation at 8 C.F.R. § 204.5(h)(3)(viii) requires evidence a leading or critical role. Thus, by definition, the role need not be leading. While the role of Ubaldo Piangi is not one of the two male leading roles, the petitioner is correct that he is featured on the promotional materials for the show. In addition, he is specifically mentioned by name in the review of the soundtrack for the Canadian production. Moreover, the petitioner's contract for the national tour in the United States identifies Ubaldo Piangi as a "principal role." We concur with the director that every role, while necessary to the story, is not necessarily "critical" as contemplated by the regulation at 8 C.F.R. § 204.5(h)(3)(viii). Nevertheless, we are satisfied that the role of Ubaldo Piangi is sufficiently critical to meet this criterion. As outlined above, the petitioner has also performed in several other roles both on and off Broadway, at least some of which can also be considered "critical."

In light of the above, we find that the petitioner does, in fact, meet this criterion. Significantly, however, the petitioner's most critical roles were years before the petition was filed. Thus, while we find that the petitioner meets this criterion, the evidence is not entirely consistent with the type of *sustained* national or international acclaim contemplated by the statute.

Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

The petitioner submitted his tax return for 2004 reflecting total wages of \$74,953. The record also contains several contracts. For the touring production of "Phantom of the Opera," the petitioner was paid "minimum rehearsal scale" and \$1,422 per week. He was also paid an additional \$777 per week

for out of town costs. The petitioner also submitted materials from the Department of Labor's Occupational Outlook Handbook (OOH) reflecting that "the minimum weekly salary for actors in Broadway productions as of June 30, 2005 was \$1,422." In addition, OOH reflects that \$777 is the Equity compensation for touring companies. Thus, the petitioner's base salary for the touring production of "Phantom of the Opera" was the minimum allowed by the Equity union. We acknowledge that the petitioner was also compensated an additional 1/8 of his weekly salary for performing in the role for which he was the understudy.

The petitioner also submitted evidence that in 2000, his weekly salary for "The Irish . . . and How They Got That Way," was \$828 plus an additional \$700 for out-of-town costs. The OOH reflects that off Broadway productions have "minimums ranging from \$493 to \$857 a week as of October 23, 2005." Thus, the petitioner's wage fell within the minimum required by Equity. The petitioner also submitted data from Actor's Equity. This data reveals that of the 39,443 members in 2004-2005, only four percent earned more than \$75,000.

The director did not specifically address this criterion and the petitioner simply reaffirms his claim to meet this criterion on appeal.

As stated above, however, the petitioner must compare with the top small percentage of those who are able to work in the field; we will not broaden the petitioner's field to include those who only aspire to make their living exclusively by working in the field simply because it is a competitive field. We cannot ignore that the Actor's Equity data for annual wages includes many aspiring actors who are not yet able to make a living exclusively as an actor. Without evidence that the petitioner's compensation is comparable with the most renowned stage actors, including Tony winners, we cannot conclude that the petitioner meets this criterion.

Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

The petitioner claims to meet this criterion for the first time on appeal. The petitioner notes the overall commercial success of "The Phantom of the Opera" in all its incarnations and asserts that "Man of La Mancha," in which he recently appeared, sold 98 percent of its available seats.

It is not enough that the petitioner has been associated with a show that, in all its incarnations, has been commercially successful. The petitioner has not demonstrated that he is responsible for the commercial success of "The Phantom of the Opera," which was a commercially successful show before the petitioner was cast in the Canadian original cast in 1989. Even if we concluded that the petitioner was responsible for the commercial success of the Canadian version given the prominent placement of his name on the promotional materials, and the record contains no evidence regarding the ticket sales for this tour, the petitioner left that show in 1993. Thus, his association with that production cannot be considered evidence of sustained national or international acclaim in 2006,

when the petition was filed. We note that the petitioner played a far smaller role with the U.S. tour and cannot reasonably be found to have contributed to the commercial success of that tour.

Finally, the petitioner must also establish eligibility as of the date of filing. See 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Regl. Commr. 1971). Thus, we cannot consider the petitioner's performances after that date, such as his role of the innkeeper in "Man of La Mancha."

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

Review of the record, however, does not establish that the petitioner has distinguished himself as an actor and singer to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of his field. The evidence indicates that the petitioner shows talent and a consistent career as an actor and singer, but is not persuasive that the petitioner's achievements set him significantly above almost all others in his field. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.